

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	Criminal No.: 99 CR 939
v.	:	Filed: 09/23/99 Under Seal
FRANK D. FAUCI,	:	Seal Lifted: 07/26/00
	:	Violations: 15 U.S.C. § 1
	:	18 U.S.C. § 371
Defendant.	:	

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INFORMATION

COUNT ONE -- SHERMAN ACT CONSPIRACY
(15 U.S.C. § 1)

The United States of America, acting through its attorneys, charges:

1. Frank D. Fauci ("Fauci") is hereby made a defendant on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

2. Fauci resided in Brooklyn, New York. Fauci was the owner of Berrybest Co., Inc. ("Berrybest"). Fauci and Berrybest also used the name "Tristar" in dealings with certain customers.

3. Berrybest was an S corporation located at Fauci's residence in Brooklyn, New York. Both Berrybest and Tristar were brokers of food, health and beauty supplies, and baby supplies.

4. Odyssey House, Inc. ("Odyssey House") was a not-for-profit residential substance abuse treatment organization located in Manhattan. Odyssey House received a significant portion of its funding from the State of New York. As a condition of that funding, the State of New York required Odyssey House to solicit at least three competitive bids before it purchased any items which, in the aggregate, totaled at least \$3,000 during any 60-day period. Before purchasing most food items, Odyssey House solicited bids on a monthly basis from potential suppliers for dozens of food items. In addition to the regular monthly bids, Odyssey House also intermittently solicited bids for some food items, and for health and beauty supplies and baby supplies.

5. "CC-1" was a co-conspirator who was the director of operations at Odyssey House. CC-1 had primary responsibility at Odyssey House for purchasing food, health and beauty supplies, and baby supplies, among other things.

6. "CC-2" was a co-conspirator that was a corporation located in the Bronx, New York. CC-2 was a wholesaler of food, health and beauty supplies, and baby supplies. Fauci, acting through Berrybest, served as an independent sales representative for CC-2.

7. "CC-3" was a co-conspirator that was a corporation located in Queens, New York. CC-3 was a wholesaler of food, health and beauty supplies, and baby supplies.

8. Whenever in this Information reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that the

corporation engaged in such act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

9. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

II. DEFINITIONS

10. The term "food" includes, but is not limited to, groceries, produce, and frozen foods.

11. The term "health and beauty supplies" includes personal hygiene items such as soap, shampoo, deodorant, and similar items.

12. The term "baby supplies" includes diapers, wipes, baby food, infant formula, and similar items.

III. TRADE AND COMMERCE

13. During the period covered by this Count, Berrybest and Tristar purchased substantial quantities of food, health and beauty supplies, and baby supplies from wholesalers, who obtained their goods from suppliers located throughout the United States.

14. Beginning at least as early as late 1993 and continuing until at least April 1998, as a result of the conspiracy charged herein, Odyssey House awarded contracts for food, health and beauty supplies, and baby supplies worth a total of

approximately \$4.412 million to Tristar, CC-2, and CC-3. Tristar's share of these contracts totaled approximately \$1.157 million; CC-2's share totaled approximately \$1.162 million; and CC-3's share totaled approximately \$2.091 million. As a result of the scheme to defraud identified in Count Two of this Information, some of the goods specified in these contracts were never delivered, but Odyssey House paid for them nonetheless.

15. During the period covered by this Count, the activities of the defendant and co-conspirators with respect to the sale of food, health and beauty supplies, and baby supplies to Odyssey House were within the flow of, and substantially affected, interstate commerce.

IV. DESCRIPTION OF THE OFFENSE

16. Beginning at least as early as late 1993 and continuing until at least April 1998, the exact dates being unknown to the United States, the defendant and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

17. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of food, health and beauty supplies, and baby supplies awarded by Odyssey House.

18. For the purpose of forming and effectuating the aforesaid combination and

conspiracy, the defendant and co-conspirators did those things which they combined and conspired to do, including, among other things:

- (a) coordinated monthly food bids from CC-2 and CC-3 to Odyssey House in the following way:
 - (i) initially, the owner of CC-3 prepared and submitted to Odyssey House monthly food bids on behalf of both CC-3 and CC-2. The bids were prepared so that CC-3 would be the low bidder on most items, and CC-2 would be the low bidder only on some produce items;
 - (ii) later, the owner of CC-3 continued to prepare and submit to Odyssey House monthly food bids on behalf of both CC-3 and CC-2. However, after receiving these bids, CC-1 gave them to Fauci, who adjusted some of the prices on CC-2's bid and resubmitted them to Odyssey House. Fauci lowered the prices on some items that had already been allocated to CC-2, and on other items so that CC-2 would win those additional items;
- (b) submitted monthly food bids from Tristar to Odyssey House with the understanding that Tristar would be the low bidder on only a few, if any, items;
- (c) arranged for one or more higher, noncompetitive bids to be submitted by other independent suppliers, for contracts for food, health and

beauty aids, and baby supplies awarded by Odyssey House, with the intention of causing those contracts to be awarded to CC-2 or CC-3; and

- (d) paid money and provided goods and services to CC-1 and to another senior official at Odyssey House for their assistance in frustrating and subverting Odyssey House's program for seeking competitive bids for contracts for food, health and beauty supplies, and baby supplies, and for ensuring that no potential competitors who were not co-conspirators would be invited to bid on such contracts.

V. JURISDICTION AND VENUE

19. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of New York within the five years preceding the filing of this Information.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

COUNT TWO -- CONSPIRACY
(18 U.S.C. § 371)

The United States of America further charges:

20. Paragraphs 1 through 6 and Paragraphs 8 through 12 of Count One of this Information are repeated, realleged, and incorporated in Count Two as if fully set forth in this Count.

VI. DESCRIPTION OF THE OFFENSE

21. From at least as early as 1994 and continuing until at least April 1998, the exact dates being unknown to the United States, the defendant and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to defraud the United States of America and to commit offenses against the United States of America, to wit, to violate Title 26, United States Code, Section 7201, and to violate Title 18, United States Code, Sections 1341 and 1346.

22. It was a part and object of the conspiracy that Fauci and his co-conspirators would and did defraud the Internal Revenue Service ("IRS") by impeding, impairing, defeating, and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment, and collection of income taxes due from Fauci, other individuals, and various entities by (a) impeding and impairing scrutiny by the IRS of the true nature of payments made by Odyssey House to Tristar and to CC-2; and (b) impeding and impairing scrutiny by the IRS of the existence or true nature of payments made by Fauci, Tristar, and CC-2 to

certain third parties.

23. It was a further part and object of the conspiracy that Fauci and his co-conspirators would and did attempt to evade and defeat a substantial part of the income tax due and owing the United States by Fauci and others, in violation of Title 26, United States Code, Section 7201.

24. It was a further part and object of the conspiracy that Fauci and his co-conspirators, having devised and intending to devise a scheme and artifice to (a) defraud Odyssey House; (b) obtain money and property from Odyssey House by means of false and fraudulent pretenses, representations, and promises; and (c) deprive Odyssey House of its right to the honest services of certain of its employees; executed the scheme and artifice by and through the use of the United States mails, in violation of Title 18, United States Code, Sections 1341 and 1346.

VII. THE MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

25. From approximately early 1994, soon after Odyssey House began placing orders with CC-2, and continuing until at least April 1998, Fauci paid cash kickbacks totaling approximately \$43,728 to CC-1. These kickbacks amounted to 5% of the total value of those orders placed with CC-2 that were actually delivered to Odyssey House. Fauci paid these kickbacks in order to ensure that CC-2 would be allocated a portion of the total value of contracts for food, health and beauty aids,

and baby supplies awarded by Odyssey House.

26. In addition to the kickbacks described in Paragraph 25 above, from some time in 1994 until at least April 1998, Fauci and CC-1 embezzled approximately \$1.330 million from Odyssey House. This embezzlement took place in the following manner:

- (a) initially CC-1 asked Fauci to assist him in the diversion of funds out of certain budgets of Odyssey House, and claimed that the funds would be applied to other, legitimate business purposes on behalf of Odyssey House. Fauci agreed to assist CC-1 in such a diversion, and the two arranged for Odyssey House to pay for merchandise that was never delivered. Fauci then returned half of the total amount of the transaction in cash to CC-1;
- (b) soon thereafter, still in 1994, CC-1 indicated to Fauci that he wanted them to take money from Odyssey House on a regular basis. This time, however, CC-1 acknowledged to Fauci that he intended to keep for himself the cash that Fauci would give him. Fauci agreed to participate in this scheme, in part, to protect his allocation of the contracts that were subject to the bid-rigging conspiracy described in Count One of this Information. CC-1 later revealed to Fauci that he was sharing his portion of the funds with a senior executive at Odyssey House;
- (c) to carry out the scheme, Fauci and CC-1 caused Odyssey House and Tristar and CC-2 to issue false and fraudulent purchase orders and invoices. The purchase orders were false and fraudulent in that they

purported to order food, health and beauty supplies, and baby supplies which they did not intend to deliver. Fauci caused Tristar and CC-2 to issue to Odyssey House invoices corresponding to those purchase orders. Fauci and CC-1 falsely certified that Odyssey House had received all of the goods described in those purchase orders and invoices, and thereby caused Odyssey House to pay the full amount stated in them. In actuality, CC-2 provided none, and Tristar less than 10%, of the food, health and beauty supplies, and baby supplies described in those purchase orders.

27. In order to obtain the cash that he paid to CC-1, Fauci cashed checks issued by CC-2 to Berrybest and checks Berrybest issued to him. Fauci caused Berrybest to improperly deduct the full value of the checks it issued to him as ordinary and necessary business expenses on Berrybest's U.S. Income Tax Returns for an S Corporation, Forms 1120S.

28. Through these means, Fauci and his co-conspirators impeded and impaired the IRS's scrutiny of (a) the U.S. Individual Income Tax Returns, Forms 1040, filed by Fauci, CC-1, and certain other co-conspirators; (b) the U.S. Income Tax Returns for an S Corporation, Forms 1120S, filed by Berrybest; (c) the U.S. Corporation Income Tax Returns, Forms 1120, filed by CC-2; (d) the true nature of the payments made by Odyssey House to Tristar and to CC-2; and (e) the existence and nature of payments made by Fauci to CC-1. Moreover, CC-1 reported none, and Fauci only a portion, of their receipt of the money they embezzled from Odyssey House as income on their U.S. Individual Income Tax Returns, Forms 1040.

VIII. OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

29. Between 1994 and April 1998, Fauci and his co-conspirators caused Odyssey House to issue approximately 154 false and fraudulent purchase orders, and caused Berrybest and CC-2 to issue approximately 154 false and fraudulent invoices corresponding to those purchase orders.

30. On or about April 15, 1995, April 15, 1996, April 15, 1997, and April 15, 1998, Fauci filed U.S. Individual Income Tax Returns, Forms 1040, for the calendar years 1994 through 1997, which failed to report all of his income from the embezzlement scheme described in this count of the information, and thereby substantially underreported Fauci's correct tax due and owing.

31. On or about April 15, 1995, April 15, 1996, April 15, 1997, and April 15, 1998, Fauci caused Berrybest to file U.S. Income Tax Returns for an S Corporation, Forms 1120S, for the calendar years 1994 through 1997, which falsely understated the taxable income of Berrybest by failing to report as income some of the payments from CC-2, and by overstating the cost of goods sold by including in that number certain expenses which should not have been included.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371

COUNT THREE -- CONSPIRACY (18 U.S.C. § 371)

The United States of America further charges:

32. Paragraphs 1 through 3 and Paragraphs 8 through 12 of Count One of this Information are repeated, realleged, and incorporated in Count Three as if fully set forth in this Count.

IX. THE RELEVANT PARTIES AND ENTITIES

33. "Organization-1" was a corporation located in the Bronx, New York. Organization-1 was a wholesaler of food, health and beauty supplies, and baby supplies. Fauci, acting through Berrybest, served as an independent sales representative for Organization-1.

34. "Organization-2" was a not-for-profit social service organization located in New York City. Organization-2 received a significant portion of its funding from the State of New York. As a condition of that funding, the State of New York required Organization-2 to solicit at least three competitive bids before it purchased any items which, in the aggregate, totaled at least \$3,000 during any 60-day period. Before purchasing most food items, Organization-2 solicited bids from potential suppliers. Fauci submitted bids on behalf of each of Berrybest and Organization-1 to Organization-2 on a yearly basis.

35. "CC-4," "CC-5," and "CC-6" were co-conspirators who were employees of Organization-2 with responsibility for purchasing food.

35. "CC-7" was a co-conspirator who was the executive director of Organization-2.

X. DESCRIPTION OF THE OFFENSE

36. From at least as early as January 1995 and continuing until October 1998,

the exact dates being unknown to the United States, the defendant and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to defraud the United States of America and to commit offenses against the United States of America, to wit, to violate Title 18, United States Code, Sections 1341 and 1346, and Title 26, United States Code, Section 7201.

37. It was a part and object of the conspiracy that Fauci and his co-conspirators would and did defraud the Internal Revenue Service ("IRS") by impeding, impairing, defeating, and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment, and collection of income taxes due from Fauci, other individuals, and various entities by impeding and impairing scrutiny by the IRS of the existence or true nature of payments made by Fauci and Berrybest to certain third parties.

38. It was a further part and object of the conspiracy that Fauci and his co-conspirators would and did attempt to evade and defeat a substantial part of the income tax due and owing the United States by Fauci and others, in violation of Title 26, United States Code, Section 7201.

39. It was a further part and object of the conspiracy that Fauci and his co-conspirators, having devised and intending to devise a scheme and artifice to (a) defraud Organization-2; (b) obtain money and property from Organization-2 by means of false and fraudulent pretenses, representations, and promises; and (c) deprive Organization-2 of its right to the honest services of certain of its employees; executed the scheme and artifice by and through the use of the United States mails,

in violation of Title 18, United States Code, Sections 1341 and 1346.

XI. THE MANNER AND MEANS BY WHICH THE
CONSPIRACY WAS CARRIED OUT

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

40. From at least as early as January 1995 until October 1998, Fauci paid cash kickbacks totaling at least \$28,295.75 to CC-4, CC-5, and CC-6. The kickbacks amounted to approximately 4% or 5% percent of the total value of the contracts awarded by Organization-2 to Berrybest and to Organization-1, and were paid on a monthly basis.

41. Fauci paid the kickbacks to ensure that Berrybest and Organization-1 would be allocated a portion of the total value of contracts for food awarded by Organization-2, and to discourage CC-4, CC-5, and CC-6 from seeking bids from other food suppliers.

42. In order to generate the funds used to pay the kickbacks, Fauci caused Berrybest to issue checks to himself, which he then cashed.

43. In addition, on one occasion, Fauci agreed with CC-5 and CC-7 to assist in converting \$10,000 from Organization-2's budget into cash to be used for the benefit of CC-7. In furtherance of this scheme, CC-5 caused Organization-2 to issue false and fraudulent purchase orders, and Fauci caused Berrybest to issue false and fraudulent invoices, totaling approximately \$10,000. These purchase orders and invoices were false and fraudulent in that they purported to reflect the sale of

merchandise that was not intended to be delivered, and in fact never was delivered. After Berrybest received payment, Fauci gave CC-5 approximately \$5,000 in cash.

XII. OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

44. On or about April 15, 1996, April 15, 1997 and April 15, 1998, Fauci caused Berrybest to file U.S. Income Tax Returns for an S Corporation, Forms 1120S, for the calendar years 1995, 1996, and 1997. These returns falsely understated the taxable income of Berrybest by overstating the cost of goods sold, because Fauci caused Berrybest to claim as ordinary and necessary business expenses the full value of the checks Berrybest wrote to Fauci, which checks he cashed and used a portion of the cash to pay kickbacks to CC-4, CC-5, and CC-6.

45. On numerous occasions between January 1995 and October 1998, Organization-1 received checks from Organization-2 and issued commission payments to Berrybest.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371

_____/s/_____
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